United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7435

ORIGINAL

To be argued by
BERNARD J. JAFFE

In The

United States Court of Appeals

For The Second Circuit

MURRAY GLADSTONE,

Plaintiff-Appellant,

vs.

FIREMAN'S FUND INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York

BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

The decision herein appealed from was rendered by Judge Henry F. Werker of the United States District Court for the Southern District of New York. His opinion is unreported.

ISSUES PRESENTED FOR REVIEW

1. Whether the lower court erred in finding that the answers provided by the plaintiff to Questions 2 and 11 of the Proposal were untrue.

2. Whether the defendant is estopped from asserting that the answers to Questions 2 and 11 of the Proposal are untrue because their special agent who had knowledge of all facts prepared these answers.

3. Whether the lower court erred in its finding that the premium rate was affected by the answers to Questions 2 and 11 of the Proposal.

4. Whether the lower court erred in not finding that the plaintiff had substantially complied with the three conditions precedent in the policy.

5. Whether the lower court erred in not finding that the defendant's election to issue the policy with full

knowledge of all facts and retention of the premium estopped the defendant from asserting any defenses under the policy.

STATEMENT

This is an appeal from a judgment entered July 15, 1975, granting the defendant's motion for summary judgment.

The plaintiff brought this action for the recovery of Jewelers' Block insurance which was issued to the plaintiff by the defendant on June 8, 1971, pursuant to policy No. JB 100-57-92, insuring the plaintiff for a period of 12 months commencing on May 7, 1971, and ending on May 7, 1972, against loss by burglary, larceny, theft or robbery of the general stock of plaintiff consisting of loose diamonds, pearls, and other items of jewelry, in the plaintiff's business premises located at 263 Center Avenue, Westwood, County of Bergen, New Jersey, in the amount of $35,000.

Demand for recovery is based on the loss of certain jewelry which occurred as the result of a robbery which took place on May 21, 1971, at the plaintiff's business premises. The plaintiff's losses were in excess of $35,000, the amount of the policy. The plaintiff did not receive the policy until June 18, 1971. Although the plaintiff has complied

with all the provisions of the policy, the defendant has refused and continues to refuse to effect payment of the proceeds as agreed to under the policy. The defendant also chose to retain the premium and has never returned it.

The plaintiff commenced his action against the defendant in the Supreme Court of New York, County of New York, and the said action was subsequently removed by the defendant to this Court on the grounds of diversity of citizenship and jurisdictional amount.

The amended answer of the defendant asserts certain affirmative defenses to the plaintiff's cause of action. Not all of the affirmative defenses were the subject of the defendant's motion for summary judgment. The motion addresses itself to the Proposal for Jewelers' Block policy, Questions 2 and 11 (70a, 71a) and to Condition "13" of the Jewelers' Block policy (76a).

Questions 2 and 11 of the Proposal are alleged to have been answered falsely and therefore, the defendant contends that the plaintiff has breached his warranties and cannot recover under the policy. Condition "13" of the policy contains three conditions precedent which the defendant claims have not been fulfilled by the plaintiff thereby

resulting in a forfeiture of protection under the policy. As will be subsequently shown, all of these allegations are without merit and should have been rejected; but in any case they raise issues of fact which cannot be decided in a motion for summary judgment by the defendant, but rather, must be left for the tr[illegible] the facts.

Although the defendant states that the representations made by the plaintiff in response to Questions 2 and 11 of the Proposal are admittedly untrue, such a statement is totally false and without foundation. Plaintiff has never denied the veracity or correctness of the answers which he gave to those questions. Those answers were true and correct when made and they are just as true and correct at the present time. Contrary to the defendant's contentions, the plaintiff's old business of selling items of jewelry at wholesale and using his home as his base of operations was clearly not the same as his new business of owning and operating a retail jewelry store. The defendant is estopped from asserting this defense in any case as will be seen.

The defendant alleges that the plaintiff has failed to fulfill all three conditions precedent under Condition

"13" of the policy. It is falsely stated in the affidavit of James M. Hughes (29a-32a) that the plaintiff admittedly gave only telephone notice to the broker regarding the loss. The broker gave the defendant written notice of loss on behalf of the plaintiff. The plaintiff substantially complied with the two other conditions precedent as well. Even if the defendant were able to prove that the plaintiff has not fulfilled Condition "13", the defendant is estopped from asserting such failure as a defense, as is subsequently shown to be the law of New Jersey.

The decision in the court below (99a) held that the answers to Questions 2 and 11 of the Proposal were untrue, and as such constituted a breach of warranty which rendered the policy void. Although the court stated that neither a written notice of loss nor a sworn proof of loss had been filed, it did not reach the question of whether its conclusion on these matters would void the policy.

APPLICABLE LAW

There is no issue as to the applicable law on this appeal; the law of the State of New Jersey is controlling.

THE STATEMENT UNDER GENERAL RULE 9(g)

The Southern District has a local rule whereby there shall be annexed to the Notice of Motion for Summary Judgment a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried (see Addendum).

The defendant served the required statement by mail on May 29, 1975 (48a). Such statement was not annexed to the Notice of Motion for Summary Judgment which was served personally on the plaintiff's attorney on May 27, 1975. Therefore service of the Statement Under General Rule 9(g) was improperly made and defective.

Furthermore, although the Statement was apparently mailed on May 27, 1975, to the plaintiff's attorney, it was never received. Had this statement been received, the statement in opposition required by said Rule would have been filed. There is no question that the allegations presented in the defendant's statement have been vigorously disputed by the plaintiff throughout all proceedings in this matter. It is therefore respectfully requested that defendant's Statement Under General Rule 9(g) be disregarded and not considered on this appeal.

SUMMARY OF ARGUMENT

I. Upon examing the entire Proposal and in light of the language therein, the plaintiff's answers to Questions 2 and 11 were reasonable and correct. Considering the actual facts existing at the time the Proposal was signed, the best argument that can be put forth by the defendant is that the questions were unclear and confusing. Assuming any ambiguity existed as to how these questions should have been answered, such ambiguity must be resolved in favor of the answers provided by the plaintiff.

II. The defendant's Special Agent and underwriter had full knowledge of all material facts with respect to the plaintiff's prior business activities at the time that the plaintiff signed the Proposal. For purposes of deciding the motion for summary judgment, the lower court was required to accept the truth of the plaintiff's version of the preparation of the Proposal. Therefore the defendant is estopped from asserting that the answers to Questions 2 and 11 are untrue.

III. The premium rate is based upon the business for which the policy is sought. In this case, the policy was

for the purpose of protecting the plaintiff in his new business which was the operation of a retail jewelry store. Such premium rate was unaffected by the plaintiff's prior business activities. Any contrary conclusion would result in an illogical rating system which would have no relation to the business for which the insurance is needed.

IV. The plaintiff substantially complied with the three conditions precedent in the policy when he gave notice of loss to his broker and his broker in turn, acting as the plaintiff's agent, filed written notice of loss with the defendant, and when he fully complied with all the requests of the defendant's investigators. The plaintiff was entitled to assume that he had complied with all the terms and conditions of the policy in the absence of some communication from the defendant with respect thereto during the four-week period subsequent to the date of loss and prior to the date of receipt of the policy.

V. The defendant issued the policy after having full knowledge of all material facts. It elected to retain the premium which the plaintiff had paid and such premium has never been returned. Therefore, the defendant is estopped from asserting any defenses which it may have had under the policy.

ARGUMENT

POINT I

THE ANSWERS PROVIDED BY THE PLAINTIFF TO QUESTIONS 2 AND 11 OF THE PROPOSAL WERE CORRECT ON THEIR FACE

The Proposal for the Jewelers' Block policy must be examined as a whole in order to determine whether the plaintiff supplied the correct answers to Questions 2 and 11. Questions 1a, b, and c ask the name of the firm, the names of the individual members of the firm and the location of the premises. All the questions which follow specifically refer to the firm which is described in Question 1. No reference is made to any prior firm or business activity, nor would it even be reasonable to assume that any such information was required or desired.

Question 2 asks the "NATURE OF OUR BUSINESS BASED ON SALES." "Our business" necessarily must mean the business which is described in Question 1; otherwise it would have to explicitly include other businesses. The preliminary instruction directing that Question 2 be answered on the basis of the preceding 12 month period clearly contemplates the preceding 12 month period with respect to the business

described in Question 1. In this case the business described therein and for which insurance was desired had not as yet opened; thus, there was no preceding 12 month period and the question could only be answered on the basis of the then present estimates and expectations. No deception was perpetrated because the Proposal was replete with references to the fact that the business was new.

Irrespective of the contentions of the defendant it is clear that the business for which the plaintiff sought insurance and which was therefore described in the Proposal was not the same as the plaintiff's prior business. His prior activity which involved selling jewelry in various cities throughout the country was entirely at wholesale and was operated out of his home. The new business involved the operation of a jewelry store whose retail and wholesale sales would amount to the percentages stated in the answer to Question 2. The new business required the rental of new premises which were described in answer to Question 1c. As stated throughout the Proposal, the plaintiff's business was new; therefore, plaintiff's answer to Question 2 was reasonable and correct.

The best argument that the defendant can possibly advance is that Question 2, when coupled with the instruction which precedes the numbered questions, is ambiguous. Even if the Court were to accept this conclusion, it must find that the plaintiff answered correctly. The law of New Jersey has been long established as stated in State Farm Mut. Auto Ins. Co. v. Cocuzza, 91 N.J. Super. 60, 63, 219 A.2d 190 (1966):

> It is settled law that whenever possible policies of insurance are to be construed in favor of the policyholder or beneficiary and strictly construed against the insurer. Schneider v. New Amsterdam Cas. Company, 22 N.J. Super. 238 (App. Div. 1952); Capece v. Allstate Ins. Co. v. State Farm, etc., Ins. Co., 88 N.J. Super. 535 (Law Div. 1965). Where any ambiguity appears, the insured is to have the benefit of a favorable construction. Id. And where the language of the policy is capable of two reasonable interpretations, the court will adopt that which permits recovery rather than the one which would deny coverage. Ohio Cas. Ins. Co. v. Flanagin, 44 N.J. 504 (1965)...

The New Jersey Supreme Court has explained the rationale of the above-cited rule in the case of Allen v. Metropolitan Life Ins. Co., 44 N.J. 294, 305, 208 A.2d 638, 644 (1965):

> While insurance policies and binders are contractual in nature, they are not ordinary contracts but are "contracts of adhesion" between parties not equally situated. See Steven v. Fidelity and Casualty Co. of New York, 58 Cal.2d 862, 27 Cal. Rptr. 172, 377 P.2d 284, 296-298 (1962);

> cf. Linden Motor Freight Co., Inc. v. Travelers Ins. Co., 40 N.J. 511, 524-525, 193 A.2d 217 (1963); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 389, 161 A.2d 69, 75 A.L.R.2d 1 (1960). The company is expert in its field and its varied and complex instruments are prepared by it unilaterally whereas the assured or prospective assured is a layman unversed in insurance provisions and practices. He justifiably places heavy reliance on the knowledge and good faith of the company and its representatives and they, in turn, are under correspondingly heavy responsibility to him. His reasonable expectations in the transaction may not justly be frustrated and courts have properly molded their governing interpretative principles with that uppermost in mi[illegible] Thus we have consistently construed policy terms strictly against the insurer and where several interpretations were permissible, we have chosen the one most favorable to the assured.

Also in this regard see Wilkinson v. Providence Washington Ins. Co., 124 N.J. Super. 466, 307 A.2d 639 (1973) and cases cited therein.

The plaintiff's answers to Question 11 are obviously correct. Question 11's general heading states "PROPERTY OUTSIDE OF OUR PREMISES AS SET FORTH IN QUESTION 1C DURING THE LAST 12 MONTHS" (emphasis added). The premises described in the answer to Question 1c were not in existence during the previous 12 months, and as previously stated, neither was the plaintiff's business. Under the circumstances the

plaintiff supplied the only logical answers. The discussion with respect to Question 2 applies with equal force to Question 11.

POINT II

THE DEFENDANT IS ESTOPPED FROM ASSERTING THAT THE ANSWERS TO QUESTIONS 2 AND 11 OF THE PROPOSAL ARE UNTRUE BECAUSE THEIR SPECIAL AGENT WHO HAD KNOWLEDGE OF ALL FACTS PREPARED THESE ANSWERS

All prior argument has been directed at the printed Proposal in and of itself, as if it had been personally prepared by the plaintiff acting alone. Such was not the case. It is admitted by the defendant, in the affidavit of Robert J. Forrester (4a), that Mr. Forrester, acting as a Special Agent and underwriter for the defendant, wrote in the answers to the questions contained in the Proposal. In the plaintiff's affidavit (52a), and in the affidavit of Joan Scharetta (68a), it is stated that the plaintiff was instructed by Mr. Forrester to base his responses to the questions on his new business only. The plaintiff states that Mr. Forrester was fully advised as to the plaintiff's past business activities. Although this is denied in Mr.

Forrester's affidavit, it is clearly a question of fact for the trier of the facts to decide. It cannot be decided as a matter of law pursuant to a motion for summary judgment.

Assuming the plaintiff is able to prove his version of the meeting with Mr. Forrester, as the lower court was required to assume for purposes of deciding a motion of this type, then the defendant is estopped from asserting the defense that the answers to Questions 2 and 11 were not as warranted. The case of Harr v. Allstate Ins. Co., 54 N.J. 287, 304, 255 A.2d 208, 218 (1969) is directly on point:

> Although we have not previously passed upon the question here involved, we have no hesitation in deciding, in line with the rationale just outlined, that, speaking broadly, equitable estoppel is available to bar a defense in an action on a policy even where the estopping conduct arose before or at the inception of the contract, and that the parol evidence rule does not apply in such situations. The contrary holding of Dewees v. Manhattan Insurance Co., supra (35 N.J.L. 366) and Franklin Fire Insurance Co. v. Martin, supra (40 N.J.L. 568) and their progeny can no longer be considered to be the law of this state.

The non-waiver clause of the policy will not save the defendant from liability as it is clearly inapplicable on two separate and distinct grounds. First see Peloso v. Hartford Fire Ins. Co., 102 N.J. Super. 357, 367, 246 A.2d

52, 58 (1968) where the court distinguishes "waiver" and "estoppel" stating:

> By waiver is meant the voluntary intentional relinquishment of a known right. Warren, supra. Estoppel, as distinguished from waiver, rests "upon the principle that where anyone has done an act, or made a statement, which it would be a fraud on his part to controvert or impair, because the other party has acted upon it in the belief that what was done or said was true, conscience and honest dealing require that he not be permitted to repudiate his act, or gainsay his statement".

The question of whether an estoppel took place must be left to the trier of the facts to decide.

Second the non-waiver clause is in the policy but is not in the Proposal. As previously stated, the Proposal was signed on May 7, 1971. The policy was not received until June 18, 1971. It is inconceivable that the non-waiver clause, which was not communicated to the plaintiff until six weeks had elapsed from the time the Proposal was signed, was binding as of that date. Clearly this clause has no relation to events which took place prior to the issuance of the policy. To hold otherwise would lend judicial approval to ex post facto clauses replete with surprise and unfairness. Had the defendant meant the non-waiver clause to be applicable to the Proposal such clause should have been contained therein.

There can be no question that the plaintiff was not bound by a clause which did not exist at the time of the signing of the Proposal.

POINT III

EVEN IF THE ANSWERS TO QUESTIONS 2 AND 11 OF THE PROPOSAL ARE INCORRECT THEY DO NOT CONSTITUTE MATERIAL MISREPRESENTATIONS WHICH AFFECT THE PREMIUM RATE AND THE RISK ASSUMED BY THE DEFENDANT

In each of the cases cited by the court below (103a) there was no question that misrepresentations had been made in the Proposals for Jewelers' Block policies. The only issue in these cases was the materiality of the misrepresentation. In M. Chalom & Son, Inc. v. St. Paul Fire and Marine Ins. Co., 285 F.2d 909 (2d Cir. 1961) and Wilberg Jewelry Corp. v. Palatine Ins. Co., Ltd., 205 F.S. 696 (S.D.N.Y. 1962) the misrepresentation was deemed material because a policy issued on the basis of the true facts would have been at a higher premium. In the case at hand there is a serious question as to whether a misrepresentation was made. Assuming arguendo, that the answers to Questions 2 and 11 are misrepresentations, these "misrepresentations" are not material.

If the alleged misrepresentations had not been made by the plaintiff, the premium rate for the insurance issued by the defendant would still have been the same. Regardless of the business activities in which the plaintiff was engaged in the 12 month period which preceded the signing of the Proposal, the policy of insurance which was issued related to the business which was to be conducted in the new jewelry store. That business had sales which were 10% wholesale and 90% retail, and all the property in that business was kept on the premises.

The defendant misled the court below when it contended that Sections 17:29A-6, 17:29A-15, and 17:29A-17 of New Jersey Statutes Annotated would have required the defendant to charge premium rates in accordance with the plaintiff's former business activity. It is quite interesting to speculate as to what the defendant's position would have been if the order of the plaintiff's business activities had been reversed. Is the defendant seriously contending that the premium rates would have been those applicable to a retail jewelry store where all property is kept on the premises if the plaintiff had decided to close his store and sell his jewelry wholesale around the country? The answer is clearly no. Rather, if the situation had been

reversed and the plaintiff had answered Questions 2 and 11 based on his jewelry store business of the preceding 12 month period, it is safe to assume that the defendant would have accused the plaintiff of fraud.

This Court will also note that the two cases cited in the decision below are both New York cases, although the opinion emphasizes that the issues in this case are governed by the law of New Jersey (103a).

POINT IV

THE PLAINTIFF HAS SUBSTANTIALLY COMPLIED WITH THE THREE CONDITIONS PRECEDENT IN THE POLICY

The plaintiff's actions following the robbery of his store, as stated in his affidavit (53a - last paragraph, 54a - first paragraph), show that he has substantially complied with Condition "13" of the policy (76a). First, with respect to the required notice of loss, the plaintiff telephoned his insurance broker immediately after the robbery. The broker then telephoned the defendant and followed this by sending to the defendant written notice of loss (74a) on behalf of the plaintiff. See Biederman v. Commercial Casualty Ins. Co., 4 Misc. 591, 133 A. 772 (1926).

The law of New Jersey is clear both by statutory authority and by case authority that an insurance broker acts as the agent of the insured. See definition in Section 17:22-6.2 of New Jersey Statutes Annotated. Although the insurance broker's commission is generally paid by the company with which the insurance is placed, the broker is usually held to be the agent of the insured. See Milliken v. Woodward, 64 N.J.L. 444, 45 A. 796 (Supp. Ct. 1900). In Appleman, Insurance Law & Practice, Vol. 16, Section 8727 it is stated that unless there are special conditions or circumstances in a particular case, the broker is not the agent of the insurer, and he may not be converted into an agent for the insurer without some action on the part of the company or the existence of some facts from which his authority to represent it as an agent may be fairly inferred. When the plaintiff's broker sent written notice of loss to the defendant, he was acting as the agent of the plaintiff.

Second, with respect to the sworn proof of loss, the plaintiff substantially complied with that requirement when he gave his written statement to Carl Grimm (38a). The case of Evans v. Farmers' Reliance Ins. Co., 110 N.J.L. 159, 160, 164 A. 258 (1932) is illustrative of this point. There, the defendant contended, as a part of its defense, that the plaintiff had not

fulfilled the conditions precedent to bringing his action. Two of the conditions allegedly not fulfilled were notice of loss by fire and proof of loss. The court found substantial compliance with the conditions, stating:

> In view of the evidence, and for reasons now to be stated, we think that those conditions of the policies did not prevent the direction of a verdict for the plaintiff.
>
> As to the notice of loss by fire: The fire occurred on August 24th, 1929. The adjusters of the defendant company were at the scene of the fire on August 25th, 1929; the assistant secretary of the defendant and another adjuster for the defendant were there on September 20th, 1929, and at that time went over the fire loss and cause a paper to be signed by the plaintiff which recites the particular fire and the date thereof.
>
> As to proof of loss: When the adjusters were at the scene of the fire on September 20th, 1929 (according to the testimony of the assistant secretary of the defendant), they and the plaintiff "went over the items that were lost and I took his estimate of what he thought they were worth."

Here, the plaintiff clearly did much more.

In light of the fact that plaintiff did not receive the policy until June 18, 1971, and that prior to such date both the plaintiff and the defendant had had substantial contact with respect to the loss, defendant could not fairly claim that the plaintiff had failed to comply with the terms and conditions of the policy. During all the time from the

date of the loss to the date the policy was received only the defendant had knowledge of the conditions set forth in the policy. It is both unrealistic and inequitable to assume that anyone in a similar position to that of the plaintiff would have examined the policy closely at this late date without some indication from the defendant that some of the policy's terms and conditions had not as yet been met. Any doubt which might exist as to the plaintiff's substantial compliance with any of the conditions precedent must be resolved by the trier of the facts.

POINT V

THE DEFENDANT IS ESTOPPED FROM ASSERTING ANY DEFENSES UNDER THE POLICY AFTER HAVING ISSUED THE POLICY WITH FULL KNOWLEDGE OF ALL FACTS AND AFTER RETAINING THE PREMIUM WHICH HAD BEEN PAID BY THE PLAINTIFF

The lower court cites the decisions in Procacci v. United States Fire Ins. Co., 118 N.J.L. 423, 193 A. 180, 182 (1937), Brynildsen v. Ambassador Ins. Co., 113 N.J. Super. 514, 274 A.2d 327 (1971), and Guarraia v. Metropolitan Life Ins. Co., 90 N.J.L. 682, 101 A. 298 (1917) (103a) in support of its decision that the plaintiff's alleged breach of warranty voided the insurance contract. Unlike the present case, in each of these cases the plaintiff conceded

that there had been a breach of warranty. There was no ambiguity in the wording of the questions. As stated in Procacci at 118 N.J.L. 427:

> In the case before us, the policy being of the New Jersey standard form, the provision, "while occupied as a store and dwelling" is definite, precise and unambiguous and contemplates use and occupancy of the building for the purposes stated.

As previously shown, the situation which is now before this court is quite different than that which was present in these three cases. The court in Procacci never reached the question of whether a failure to return the premium estopped the insurer from asserting its defense of breach of warranty. The court stated that this issue had not been raised prior to appeal.

It is undisputed that Carl B. Grimm, a claims representative of the defendant, visited the plaintiff's premises on June 1, 1971. It is also undisputed that Mr. Grimm obtained a written statement from the plaintiff on that date (38a). This statement fully and clearly discloses all business activities of the plaintiff in the 12 month period immediately preceding the date when the Proposal was signed. In spite of the defendant's full and complete knowledge of all facts on June 1, 1971, the defendant voluntarily elected to issue the policy to the plaintiff on June 8, 1971 (75a).

The defendant is estopped from asserting the defense of breach of warranty after having made its decision to issue the policy, having in its possession all the facts.

The law of New Jersey leaves no room for doubt that the defendant is estopped by its election. Merchants Ind. Corp. v. Eggleston, 37 N.J. 114, 130, 179 A.2d 505 (1962). is a case where the defendant claimed fraud in the inception of an insurance agreement. The language of the Supreme Court is firm and decisive:

> When a contract is obtained by fraud, the law grants the injured party a choice. He may rescind or affirm. If he rescinds, he must return what he received, here the premium for covering the Thunderbird, albeit the amount is quite small. On the other hand, he may choose to affirm the contract, whereupon he retains the consideration he received and has as well a claim for money damages for deceit, which in the circumstances of a liability policy would probably be at best a claim for such additional premium as should have been paid for the coverage. But the defrauded party must thus elect which course he wishes to follow. He cannot pursue both. If he elects to continue with the contract, the election is final and the contract is affirmed, not because he wants it to be, but because the law makes it so. And if by his conduct he affirms the contract, he cannot be heard to say that he did not "voluntarily" or "intentionally" relinquish his right to call off the deal. Massachusetts Accident Co. v. Stone, 127 N.J.Eq. 97, 100, 11 A.2d 71 (E. & A. 1940); Kazepis v. North Jersey Holding Co., 111 N.J.Eq. 342, 162 A. 595 (E. & A. 1932); Ajamian v. Schianger, 20 N.J. Super. 246, 249, 89 A.2d 702 (App. Div. 1952); 2 Restatement, Contracts (1932), Section 484; 5 Williston, Contracts (Rev. ed. 1937), Section 1527,

> p. 4277; 16 Appleman, Insurance Law & Practice (1944), Section 9254, p. 811. Neither consideration nor detriment is necessary to support the finality of the choice. 3 Richards, Insurance (1952), Section 434, p. 1456.

There is no dispute that the defendant has never returned the premium paid by the plaintiff. In fact, in its memorandum decision the lower court specifically directs the defendant to refund to the plaintiff the premium paid (104a). By such direction without further comment the court shows its failure to consider this issue. In Englishtown Auc. Sales v. Mt. Vernon Fire Ins., 112 N.J. Super. 333 (1970) it was held that the insurer's failure to return the premium precluded the insurer from raising any defenses under the policy. The court distinguished Bohles v. Prudential Ins. Co., 84 N.J.L. 315 (E. & A. 1912) where a factual issue had been raised because the company retained the premium for only three weeks and then returned the same. In Englishtown Auc. Sales, as in the present case, there never was a return of the premium. Therefore the defendant unconditionally waived any forfeiture. As was stated in New Jersey Rubber Co. v. Commercial Assur. Co., 64 N.J.L. 580, 586 (E. & A. 1900):

> Clearly, the defendant could not assert a right to the premium for valid insurance, and at the same time insist that the insurance had never been effected. By claiming and maintaining such a right, with full knowledge of

> all material circumstances, it unequivocally asserted the validity of the insurance for the period covered by the premium, and definitively waived every objection on which its validity could be denied.

Also, see Harr v. Allstate Ins. Co., supra.

Regardless of the validity of all prior argument, it can not be denied that the defendant issued the policy after having full knowledge of all material facts and then chose to retain the premium which the plaintiff had paid and has never returned the same. By its actions and omissions, the defendant has affirmed the validity of the policy.

CONCLUSION

For the foregoing reasons, judgment of the District Court granting the defendant-appellee's motion for summary judgment should be reversed.

Respectfully submitted,

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BERNARD J. JAFFE,
Of Counsel

ADDENDUM

Rules of the United States District Courts for the Southern and Eastern Districts of New York: General Rules for the Southern and Eastern Districts

9(g) Upon any motion for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.

The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MURRAY GLADSTONE,

Plaintiff-Appellant,

against

FIREMANS FUND INSURANCE CO.,

Defendant-Appellee.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

James A. Steele *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
310 W. 146th St., New York, N. Y.

That on the **1st** *day of* **October** *19* **75** *at* **99 John Street, N.Y., N.Y.**

deponent served the annexed Brief *upon*

Bingham Englar Jones & Houston

the **Attorneys** *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this **1st**
day of **October** *19* **75**

James A. Steele

Print name beneath signature

JAMES A. STEELE

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977